No. 82-1373

In the Supreme Court of the United States

OCTOBER TERM, 1982

ERNEST G. MILLER, PETITIONER

v.

PITTSTON STEVEDORING CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

T. TIMOTHY RYAN, JR.
Solicitor of Labor

KAREN I. WARD
Associate Solicitor

ALLEN H. FELDMAN
Counsel for Appellate Litigation

JANICE B. CORWIN
Attorney

Department of Labor
Washington, D.C. 20210

QUESTION PRESENTED

Whether a maritime employee, injured while driving a tractor-trailer containing stevedoring gear on the New Jersey Turnpike 30 minutes after leaving his employer's marine terminal, was injured on a situs covered by Section 3(a) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 903(a).

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 1a-3a) is noted in a table at 696 F.2d 983. The opinion of the Benefits Review Board (Pet. App. 1b-5b) is unreported. The decision and order of the administrative law judge (Pet. App. 1c-12c) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 1982. The petition for a writ of certiorari was filed on February 14, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. 902(3), provides in pertinent part:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker * * *.

Section 3(a) of the LHWCA, 33 U.S.C. 903(a), provides in pertinent part:

> Compensation shall be payable under this [Act] in respect of disability or death of an employee but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). * * *

STATEMENT

Petitioner Ernest G. Miller was an employee of respondent Pittston Stevedoring Corporation (Pittston) (Pet. App. 2c). On the morning of June 23, 1978, pursuant to the instructions of Ronald J. Petrocelli, an engineer and manager of operations for Pittston, petitioner assembled stevedoring gear and loaded it onto a low bed trailer for transport from Port Newark, New Jersey to a pier in Wilmington, Delaware (*id.* at 6c-7c). After lunch, acting on Petrocelli's instruction, petitioner began driving the trailer to Wilmington; he was injured on the New Jersey Turnpike, 30 minutes from Pittston's Port Newark marine terminal, in an accident resulting from a blow-out of the trailer's left front tire (*id.* at 4c, 7c). As a result of the accident, petitioner was temporarily totally disabled (*id.* at 2c). Three months prior

to the accident, petitioner had been assigned to a regular position as a truck driver to transport gear and gear parts.[1]

Petitioner was awarded compensation for his injury under the New Jersey Compensation Act (Pet. App. 3c). He then filed a claim for benefits under the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA" or "the Act"), 33 U.S.C. (& Supp. V) 901 *et seq.* The administrative law judge ("ALJ") denied petitioner's claim, finding that petitioner did not satisfy the jurisdictional prerequisites for coverage under Sections 2(3) and 3(a) of the Act, 33 U.S.C. 902(3) and 903(a) (Pet. App. 1c-12c). The ALJ held that petitioner did not satisfy the "situs" requirement of Section 3(a), because "the accident occurred on a public turnpike, a considerable distance from navigable waters or 'any adjoining area [customarily used by an employer in loading, unloading, repairing, or building a vessel]' " (Pet. App. 11c). The ALJ also found that petitioner did not satisfy the "status" requirement of Section 2(3) of the Act, because the "nature of the activity" to which petitioner was assigned, *i.e.*, driving a truck, did not constitute "maritime employment" (Pet. App. 9c).

Petitioner appealed the decision and order of the ALJ to the Benefits Review Board (the Board), pursuant to 33 U.S.C. 921(b)(3). The Board upheld the decision of the ALJ, finding that petitioner was not injured on a situs covered by Section 3(a) of the Act (Pet. App. 1b-5b). The

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[1]Petitioner performed cargo-~~holding~~ longshore jobs on five days out of the two months prior to the accident (Pet. App. 5c). Except for these isolated instances, petitioner routinely served as a stevedoring-gear truck driver during the three months prior to the injury (*id.* at 6c). The administrative law judge found that "on the day of the injury [petitioner's] job consisted solely of loading ship's gear onto a trailer and driving it from Port Newark to a pier in Wilmington, Delaware, about [three] or [four] hours away. * * * [O]n the date of the injury [petitioner] did not handle any cargo" (*id.* at 7c).

Board stated that "[i]n light of this determination with regard to Section 3(a), it is unnecessary for us to reach the Section 2(3) [status] issue" (Pet. App. 4b).

Petitioner then sought review of the Board's decision in the court of appeals, pursuant to 33 U.S.C. 921(c). Relying on this Court's decisions in *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69 (1979), and *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249 (1977), the court of appeals summarily denied the petition to set aside the Board's order (Pet. App. 1a-3a).

ARGUMENT

The court of appeals correctly upheld the Benefits Review Board's determination that a truck driver, injured on the New Jersey Turnpike 30 minutes after leaving his employer's marine terminal, does not meet the situs requirement of Section 3(a) of the LHWCA, 33 U.S.C. 903(a), and thus is not within the coverage of the Act. The decision below does not conflict with the decision of any other court of appeals, and further review by this Court is unwarranted.

1. Petitioner contends that the court of appeals, the Benefits Review Board, and the ALJ all erred in concluding that petitioner was not injured on a "situs" covered by Section 3(a) of the LHWCA.[2] Petitioner first argues (Pet. 10-19) that he qualifies as an "employee" within the meaning of Section 2(3) of the Act. He then contends (Pet. 19-23), in reliance on *Sea-Land Service, Inc.* v. *Director, OWCP*, 540 F.2d 629, 638 (3d Cir. 1976), that "once the status requirement of §2(3) is met the situs requirement of §3(a) is satisfied as well if the maritime worker was injured during the course of his employment" (Pet. 21).

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[2]Section 3(a) requires that the injury occur "upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)."

The Board, upheld by the court of appeals, correctly determined, however, that because petitioner was not injured on a situs covered by Section 3(a), it was not necessary to reach the Section 2(3) status issue (see Pet. App. 3b-4b). In *Northeast Marine Terminal Co.* v. *Caputo, supra*, 432 U.S. at 264-265, this Court concluded that the 1972 Amendments to the LHWCA "changed what had been essentially only a 'situs' test of eligibility for compensation [requiring work-related injury on navigable waters] to one looking to both the 'situs' of the injury and the 'status' of the injured." Accord, *P.C. Pfeiffer Co.* v. *Ford, supra*, 444 U.S. at 73.[3] This Court has recently reiterated that both the situs and status tests must be satisfied for an employee to fall within the coverage of the amended Act. See *Director, OWCP* v. *Perini North River Associates*, No. 81-897 (Jan. 11, 1983), slip op. 16-17.

Moreover, the Third Circuit has reevaluated its position in *Sea-Land* in light of this Court's subsequent decision in *Caputo*. In *Dravo Corp.* v. *Banks*, 567 F.2d 593, 594 (3d Cir. 1977), the court stated that *Caputo* "provides us with the relevant inquiries in determining whether coverage should be extended: both the situs of the injury and the status of the injured must be considered." 567 F.2d at 594. It

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[3]The Court in *Caputo* (432 U.S. at 273) explained that the 1972 Amendments were designed to provide uniform federal compensation for amphibious workers who would otherwise be covered only for part of their activity. To remedy the "disparity in benefits payable for death or disability for the same type of injury depending on which side of the water's edge and in which State the accident occurs," Congress in Section 3(a) enlarged the coverage of the Act to include workers who were injured on broadly defined "navigable waters," including areas adjacent to the water's edge. *Id.* at 263-264. The "maritime employment" status test was necessitated by the expanded geographical scope of the amended Act. *Id.* at 264.

therefore is safe to assume that *Sea-Land* was overruled by *Dravo* to the extent that it conflicted with *Caputo*.[4]

2. Petitioner also argues (Pet. 23-24) that the section of the New Jersey Turnpike on which the accident occurred qualifies under Section 3(a) as an "adjoining area customarily used by an employer in loading [and] unloading * * * vessel[s]." 33 U.S.C. 903(a). The Board, upheld by the court of appeals, correctly concluded that a major inland highway is not an "adjoining area" to "the navigable waters of the United States" within the meaning of Section 3(a).

As this Court explained in *Caputo*, in amending the Act Congress

> wanted a "uniform compensation system to apply to employees who would otherwise be covered by * * * [the LHWCA] for part of their activity." * * * It wanted a system that did not depend on the "fortuitous circumstance of whether the injury * * * occurred on land or over water." * * * It therefore extended the situs to encompass the *waterfront areas where the overall loading and unloading process occurs.*

432 U.S. at 272 (emphasis added), quoting from S. Rep. No. 92-1125, 92d Cong., 2d Sess. 13 (1972); H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 10-11 (1972). The legislative history of the 1972 Amendments further states that the Act as amended "expands the coverage * * * to cover injuries occurring in the *contiguous dock area* related to longshore

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[4]That the Third Circuit no longer adheres to the views it expressed in *Sea-Land* is made equally clear by the judgment order in the instant case (Pet. App. 1a-3a). Since the Board did not reach the "status" question, the decision of the court of appeals necessarily viewed the two tests independently. In any event, even if the decisions of the Third Circuit are inconsistent, that is a matter for the court of appeals, not this Court, to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

and ship repair work." S. Rep. No. 92-1125, *supra*, at 2 (emphasis added).

Contrary to petitioner's contention, therefore, the New Jersey Turnpike does not qualify as a covered situs under Section 3(a) of the Act. The Turnpike — at least at the point where petitioner was injured—does not "adjoin" navigable waters (33 U.S.C. 903(a)), and is clearly not a "waterfront area[ ]" (*Northeast Marine Terminal Co.* v. *Caputo, supra*, 432 U.S. at 272) or a "contiguous dock area" (S. Rep. No. 92-1125, *supra*, at 2). To include a major inland highway within the range of geographical coverage of the Act would be tantamount to eliminating altogether the Section 3(a) situs requirement, a requirement that Congress plainly intended to constitute an independent prong of the two-part status-situs test.[5]

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[5]The decision below is consistent with decisions of the two courts of appeals that have considered the "adjoining area" language of Section 3(a). See *Brady-Hamilton Stevedore Co.* v. *Herron*, 568 F.2d 137 (9th Cir. 1978); *Texports Stevedore Co.* v. *Winchester*, 632 F.2d 504 (5th Cir. 1980) (en banc), cert. denied, 452 U.S. 905 (1981).

In *Brady-Hamilton*, the claimant was injured in a "gear locker," a building in which loading and unloading equipment was stored and repaired. 568 F.2d at 139. The building was "located approximately 2,600 feet north of the edge of the Columbia River and 2,050 feet outside of the entrance gate of the Port of Longview," at which Brady-Hamilton's facility was located. *Ibid.* The Ninth Circuit concluded that the gear locker was located in an "adjoining area." The court noted that the equipment housed in the gear locker "was used exclusively for loading and unloading vessels at the Port of Longview," and that the "[a]djacent buildings were used as gear lockers by other companies." 568 F.2d at 141. The court found, additionally, that the gear locker "was used as an integral part of longshoring operations" and "was located in as close proximity to the dock loading area as was feasible and as circumstances permitted." *Ibid.* See also *Handcor, Inc.* v. *Director, OWCP*, 568 F.2d 143, 144-145 (9th Cir. 1978) (warehouse located 50 to 60 feet from water's edge used to load and unload cargo containers

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

T. TIMOTHY RYAN, JR.
Solicitor of Labor

KAREN I. WARD
Associate Solicitor

ALLEN H. FELDMAN
Counsel for Appellate Litigation

JANICE B. CORWIN
Attorney
Department of Labor

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qualifies as terminal customarily used in loading and unloading vessel under Section 3(a)).

In *Texports*, the employer maintained three "gear rooms" used to store and maintain loading equipment; two were located on the docks and the third, owing to insufficient space on the docks, was located "on Avenue N, five blocks from the gate of the nearest dock." 632 F.2d at 506-507. The claimant, a "gear man," was injured at the Avenue N gear room. *Id.* at 507. The court, finding that the Avenue N "gear room operations were part of the on-going overall loading process," and that "[t]he gear room was as close to the docks as was feasible," concluded that the room had "sufficient nexus to the waterfront" to qualify as within "an area customarily used by employers for loading." *Id.* at 515.

The section of the New Jersey Turnpike located 30 minutes away from respondent Pittston's marine terminal does not qualify as an "adjoining area customarily used by an employer in loading [and] unloading * * * vessel[s]" (33 U.S.C. 903(a)) under either the Ninth Circuit's or the Fifth Circuit's construction of the language of Section 3(a). The Turnpike lacks "proximity" to the waterfront (*Brady-Hamilton, supra*, 568 F.2d at 141); it is not "close to or in the vicinity of navigable waters, or in a neighboring area." *Texports, supra*, 632 F.2d at 514.